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124994

STATE OF MICHIGAN
IN THE SUPREME COURT

JOHANNA WOODARD, Individually and as Next Friend of AUSTIN D. WOODARD a Minor, and STEVEN WOODARD,

Plaintiffs-Appellees,

-vs-

JOSEPH R. CUSTER, M.D.,

Defendant-Appellant,

and

MICHAEL K. LIPSCOMB, M.D., MICHELLE M. NYPAVER, M.D. and MONA M. RISKALLA, M.D.,

Defendants.

Supreme Court No.: 124994

Court of Appeals No.: 239868
Washtenaw County Circuit Court
Case No.: 99 5364 NH

JOHANNA WOODARD, Individually and as Next Friend of AUSTIN D. WOODARD, a Minor, and STEVEN WOODARD,

Plaintiffs-Appellees,

-vs-

UNIVERSITY OF MICHIGAN MEDICAL CENTER,

Defendant-Appellant.

Supreme Court No.: 124994

Court of Appeals: 239869
Court of Claims: 99-017432 CM

/

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/

DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF ON DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL (DOCKET # 124994)

RELIEF REQUESTED

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This supplemental brief is submitted pursuant to this Court's order dated October 7, 2004, which, in lieu of granting leave to appeal, directed the Clerk of the Court to schedule oral argument to determine whether leave should be granted or other peremptory action taken under MCR 7.302(G)(1), and provided that the parties would have twenty-eight days to file supplemental briefs.

While no reported appellate decisions addressing the doctrine of res ipsa loquitur have been handed down since defendants' Application for Leave to Appeal was filed, there are a number of erroneous factual statements and legal assertions in plaintiffs' Brief in Response to defendant's Application which warrant correction.

Plaintiffs' Brief addresses the appropriate "standard of review" by reference to the *de novo* standard applicable to summary disposition motions under MCR 2.116 (C)(7) and (10). Defendant's Application, however, relates to Judge Borrello's finding that the trial court had abused its discretion in denying plaintiffs' motion to amend the complaints to assert the doctrine of res ipsa loquitur. (See, Borrello opinion, pp. 6-7) At that point (Judge Connors ruled on plaintiffs' motion to amend the complaints, and on plaintiffs' motion for extension of time to name a new expert, in an Opinion and Order dated 2/7/02 – Exhibit L to defendants' Application), Dr. Casamassima's testimony had been ruled inadmissible due to his lack of qualification, and it was clear that plaintiffs could not go forward without expert testimony unless the trial court allowed plaintiff to go forward on a res ipsa theory. As Judge Borrello indicated, citing *Dowerk v. Oxford Carter Twp.*, 233 Mich. App. 62, 75, 592 N.W.2d 724 (1998), motions to amend are reviewed on appeal under an abuse of discretion standard.

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Judge Meter found the issue of amending the complaints to be "moot," because the doctrine of res ipsa loquitur "provides plaintiffs with the means to prove the allegations in the original complaint." (Meter opinion, p. 2) In their Brief, however, plaintiffs assert that while Judge Talbot had improperly gone on a "fact finding" mission[1], ignoring proofs favorable to the plaintiffs, Judge Borrello "properly viewed the evidence in the light most favorable to plaintiffs." (Plaintiffs' Brief, p. vi.) The point here is that, neither plaintiffs nor Judge Borrello have cited any authority for the proposition that whether a res ipsa instruction (M Civ JI 30.05) should be given is reviewed on appeal under a summary disposition standard which requires that the evidence be viewed "in the light most favorable" to the plaintiffs. Where the decision to give or withhold a certain jury instruction depends upon a determination as to whether the evidence will support the instruction, trial courts are entitled to deference under the abuse of discretion standard. *Hilgendorf v. St. John Hospital,* 245 Mich. App. 670, 694-695 (2001); *Isagholian v. Transamerica Ins. Corp.,* 208 Mich. App. 9, 16, 527 N.W.2d 13 (1994).

Although plaintiffs in their Brief (at page 21) accuse defendants of "skew[ing] the facts" of this case in their Application, a detailed review of the record below will establish that it is plaintiffs who have distorted the underlying facts in their effort to suggest that the required elements are present such that this case should go to a jury, without expert testimony, with an instruction to the jury on res ipsa loquitur. Repeatedly in their Brief, often without citation to the record, plaintiffs state flatly that all potential

[1] Plaintiffs' Brief states that "scrutiny of the record will establish that Judge Talbot went on a fact finding mission (certainly not a judicial function at this level) and ignored the evidence which supported plaintiffs' claim." (Plaintiffs' Brief, p. vi.) It is apparent from Judge Talbot's opinion that he scrutinized the trial court record regarding an issue presented on appeal (something which defendants had always understood to be the duty of an appellate judge) and determined that the necessary elements to invoke the doctrine of res ipsa loquitur are not present in this case.

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causes for Austin Woodard's fractures apart from the negligence of defendants had been "ruled out" and "eliminated." The facts as found in the record demonstrate quite otherwise.

The evidence with respect to when the fractures occurred is, at best, equivocal. Dating fractures is hardly an exact science[2], and there was ample evidence that the fractures could well have occurred prior to Austin's admission to the hospital.[3] Without expert testimony to establish even that it is more likely than not that the fractures occurred during the hospitalization, there is no basis for a jury to "infer" that the injuries were due to an instrumentality within the "exclusive control" of defendants. *See, Skinner v. Square D Co.,* 445 Mich. 153, 516 N.W.2d 475 (1994). A presumption of negligence cannot arise by recourse to the doctrine of res ipsa loquitur where plaintiffs have failed to establish that the injury was caused by the defendant, or by an agency or instrumentality within defendant's control. *Jones v. Porretta,* 428 Mich. 132, 150-151, 405 N.W.2d 863 (1987).

Even if a jury could infer that the fractures occurred during the hospitalization, the "exclusive control" test is not met. Plaintiffs claim in their Brief that "[Austin's] parents were not permitted to hold or feed Austin while he was in the PICU," (page 22), yet Mrs. Woodard testified that she changed Austin's diapers while he was in the PICU.[4] The Brief at page 29 suggests that the parents were kept away much of the time, and implies that the PICU was something of a fortress, yet Mrs. Woodard testified that she was there daily, and the mother of the infant who shared a room with Austin, Ms. Kendra Reynolds,

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[2] *See,* Owings dep., Exhibit H to defendants' Application, pp. 33-34.
[3] *See,* citations to the record in defendants' Application, p. 14, n. 8-14.
[4] Woodard dep., pp. 35-36, Exhibit S to defendants' Application.

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testified that she came and went freely. (Reynolds dep., p. 10) Clearly, individuals other than the hospital staff had access to Austin.[5]

Other examples of mischaracterization of the record abound in plaintiffs' Brief. Osteogenesis imperfecta or brittle bone disease had not been "ruled out" or "eliminated" as a potential cause of the fractures; although plaintiff cites Dr. Loder's testimony for this proposition, Dr. Loder had testified merely that Dr. Innes concluded only that there was no evidence "at that time," but that this was "a clinical diagnosis that you have to watch with kids as they grow over time." (Loder dep., p. 28) Again, specific references to the record which support Judge Talbot's opinion that other potential causes of the fractures had not been ruled out are set forth in defendant's Application at pages 13 - 16.

In their Brief, plaintiffs place heavy emphasis upon the testimony of Dr. Custer that if the fractures occurred due to "mishandling" or "improperly applied mechanical force" on the part of the PICU staff, that would constitute a deviation from the standard of care. (Plaintiff's Brief, page 32, citing Custer dep., pp.35-36, appended to plaintiffs' Brief as Exhibit L). Plaintiffs assert that a breach of the standard of practice is established by this "admission," such that the requirement of expert testimony is satisfied, because "no cause other than wrongly applied mechanical force or mishandling could have caused these fractures" and "[a]ll other causes were eliminated." (Plaintiffs' Brief, pp. 33-34) Again, this is a distortion of the record. Of course, Dr. Custer agreed that if there was "***mis***handling" or "***wrongly*** applied mechanical force," then this would be a violation of the standard of care. Plaintiffs' counsel ***did not ask*** Dr. Custer whether the

[5] While res ipsa loquitur has limited application in medical malpractice cases, *Jones v. Porretta, supra,* it is not surprising that it applies most often in surgical cases. If an injury occurs during surgery, there can be little doubt that the surgical team has "exclusive control" over the patient in the surgical suite. Very different circumstances exist in the instant case.

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fractures could have occurred due to ***proper*** handling of Austin during medical procedures, or due to ***properly*** applied mechanical force. Plaintiffs' appellate counsel's statement that "no cause other than wrongly applied mechanical force or mishandling could have caused these fractures" is not a part of the record, but is merely the opinion of an attorney, which does not constitute evidence. As both the trial court and Judge Talbot properly found, whether these injuries could have occurred as a consequence of medical treatment in the absence of negligence is the stuff of expert testimony, and plaintiff did not have a pediatric intensive care expert below to address it. Again, Dr. Custer's statement that malpractice would exist if there was "***mis***handling" or "***wrongly*** applied mechanical force" does not address the issue of whether the fractures could have occurred as a result of ***proper*** handling and ***properly*** applied mechanical force during treatment.

The trial court and Judge Talbot were correct in concluding that this case cannot go to a jury without expert testimony. The statement in the majority opinion that "[a] lay person can understand that RSV bronchiolitis is not connected to broken femurs and can infer negligence" is conclusory, devoid of analysis and contrary to the many previous decisions of this court holding that expert testimony is required in medical malpractice cases in all but very limited circumstances. It is difficult to imagine a more highly specialized area of medicine than pediatric critical care. The issues presented in this case are highly technical, and are not within the purview of a lay jury. The majority decision on the res ipsa loquitur issue should therefore be reversed.

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RELIEF REQUESTED

Defendants-Appellants respectfully request that this Court enter a peremptory Order reversing that portion of the Court of Appeals' 10/21/03 decision remanding this cause to the trial court for trial and reinstating the trial court's 2/7/02 Order dismissing this cause with prejudice or, in the alternative, grant Defendant-Appellants' Application for Leave to Appeal.

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BY: 

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DATED: November 4, 2004

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PROOF OF SERVICE

STATE OF MICHIGAN)
ss.
COUNTY OF OAKLAND)

ELAINE MOORE, being first duly sworn, deposes and states that she is employed by the law firm of HEBERT, ELLER, CHANDLER & REYNOLDS, PLLC, and that on November 4, 2004, she served a copy of Defendants-Appellants' Supplemental Argument RE: Defendants-Appellants' Application for Leave to Appeal and this Proof of Service upon Craig L. Nemier, 37000 Grand River Avenue, Suite 300, Farmington Hills, MI 48335 by placing same in a United States Mail receptacle, properly addressed with postage fully prepaid thereon.

ELAINE MOORE

Subscribed and sworn to before
me on November 4, 2004.

Judith A. Cowan
Oakland County Notary Public
My Commission Expires: 01/30/05